STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF RILEY SHANE RHOADES, by NICOLE CHENOWETH, Personal Representative, and NICOLE CHENOWETH, individually,

Plaintiffs-Appellants,

v

TRINITY HEALTH-MICHIGAN, d/b/a ST. MARY MERCY MEDICAL CENTER, DR. SARA SCHUGARS, ADVANTAGE HEALTH, d/b/a ADVANTAGE HEALTH PHYSICIAN NETWORK, ADVANTAGE HEALTH PHYSICIANS, P.C., d/b/a ADVANTAGE HEALTH PHYSICIAN NETWORK, and STEPHEN HICKNER, M.D.,

Defendants-Appellees,

and

DR. A. SURAYARUN,

Defendant.

UNPUBLISHED
November 10, 2011

No. 295082
Kent Circuit Court
LC No. 08-007568-NH

Before: OWENS, P.J., and MARKEY and METER, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order dismissing plaintiffs' complaint with prejudice. We affirm.

Plaintiffs' complaint alleged medical malpractice in the prenatal care and delivery of Riley Shane Rhoades. Rhoades suffered from numerous health problems when born and died from injuries and ensuing complications sustained during labor and delivery. Plaintiffs filed their lawsuit on July 23, 2008; a scheduling order was entered on November 18, 2008. The record reveals that defendants filed two motions to compel discovery and two motions to dismiss. The deposition of plaintiff Chenoweth was scheduled and canceled three times, twice at

the behest of plaintiffs, before it was completed. Additionally, defendants had difficulty obtaining answers to interrogatories and requests for production of documents. Finally, defendants also had trouble scheduling and completing the deposition of plaintiffs' expert witnesses in a timely manner. The trial court entered two discovery orders after entering the scheduling order.

The final discovery order, entered August 7, 2009, struck four of plaintiffs' witnesses as a discovery sanction and mandated new discovery deadlines. The order required depositions of fact witnesses on August 10, 2009, and that responses to defendants' requests for production of documents be tendered by the same date. It also ordered plaintiffs to provide deposition dates for plaintiffs' remaining seven expert witnesses before September 15, 2009 and that the depositions be completed on or before November 15, 2009. Plaintiffs partially complied with the order, but they did not produce a videotape of the birth or provide deposition dates for three expert witnesses. Additionally, plaintiffs provided dates for one expert witness's deposition that were after the November 15, 2009 deadline. On October 9, 2009, the trial court dismissed plaintiffs' case for failure to comply with the discovery order entered August 7, 2009.

We review the imposition of discovery sanctions for an abuse of discretion. *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 147; 683 NW2d 745 (2004). The trial court abuses its discretion when its decision results in an outcome falling outside the range of principled outcomes. *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 404; 729 NW2d 277 (2006). This "standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Plaintiffs argue on appeal that they substantially complied with the discovery order and that dismissal was too drastic a sanction in light of plaintiffs' partial compliance. We disagree. Plaintiffs plainly violated the discovery order. Plaintiffs did not provide deposition dates for three expert witnesses who were specifically named in the order, and they provided a date after the deadline for one expert witness. Additionally, plaintiffs did not produce the videotape of the birth, indicating on May 26, 2009, that the videotape was missing. The trial court has the authority pursuant to MCR 2.313(B)(2)(c) to dismiss plaintiffs' case for failure to comply with its discovery order. Nevertheless, dismissal is a drastic sanction and should be imposed only when other sanctions are not appropriate. *Thorne v Bell*, 206 Mich App 625, 632-633; 522 NW2d 711 (1994).

In *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990), this Court set forth a non-exhaustive list of factors for trial courts to consider when determining the proper sanction for a discovery violation. These factors include whether the violation was willful, the history of compliance, the prejudice to the other party, actual notice of withheld information, whether there is a history of deliberate delay, the degree to which the offending party has complied with the provisions of the court's order, any attempts to cure defects, and whether a lesser sanction would better serve the interests of justice. *Id.* at 32-33.

The first inquiry when determining the proper sanction for a failure to comply with a trial court's discovery order is whether the violation was willful. *Dean*, 182 Mich App at 32. A discovery violation is willful "if it is conscious or intentional, not accidental." *Welch v J Walter*

Thompson, USA, Inc, 187 Mich App 49, 52; 466 NW2d 319 (1991). Wrongful intent is not required. *Id.* In this case, the complete failure to provide deposition dates for three expert witnesses and the failure to provide a date within the deadline for discovery for one additional expert witness cannot be considered accidental. Plaintiffs were aware of the discovery order's requirements and the deadlines, and the failure to timely provide expert witnesses for deposition must be considered conscious, and, thus, willful. See *Edge v Ramos*, 160 Mich App 231, 235; 407 NW2d 625 (1987) (the plaintiff's failure to comply with discovery order was willful when plaintiff was aware of scheduled examinations but failed to attend). Here, plaintiffs never indicated that they were not planning to call three experts until October 9, 2009. Plaintiffs argue the videotape is lost, so, their not producing it is not willful. But, even assuming plaintiffs are not willfully withholding the videotape, plaintiffs' other actions constitute a willful violation of the trial court's order or, at the very least, a lack of respect for the court's scheduling order and the defendants' right to discovery and timely information. Plaintiffs, of course, were free to choose their experts, which in this case meant apparently eliminating three. But not advising either the court or defense counsel of this decision until the court hearing, we believe. also constitutes willful conduct and failure to comply with the court's order.

The second *Dean* factor considers the history of compliance with past discovery requests. In this case, the record shows that plaintiffs consistently failed to timely comply with defendants' discovery requests. Defendants Advantage Health and Dr. Hickner filed two motions to compel and two motions to dismiss during discovery. Additionally, plaintiffs canceled the Chenoweth's depositions twice before it was completed, and the deposition date was agreed upon only after Advantage Health and Dr. Hickner moved to dismiss.

The third *Dean* factor requires consideration of whether prejudice resulted from the noncompliance. In this case, defendants were prejudiced by plaintiffs' noncompliance. Defendants were unable to depose some of plaintiffs' expert witnesses. While plaintiffs argue they do not intend to use these experts, they did not tell defendant that; defendants were preparing for trial without knowledge of plaintiffs' intent. Defendants were thus disadvantaged by their belief that these experts, whom they could not access, were, in fact, testifying as plaintiffs' experts. Additionally, defendants could not depose one of plaintiffs' expert witnesses until after the November deadline set forth in the discovery order. This delay left defendants with less time to adequately mount a defense, conduct any follow up discovery, and prepare for the impending case evaluation. Further, the lost videotape of the birth might have exonerated defendants or have revealed something critical to the defense. Its disappearance under these circumstances is certainly suspicious.

The fourth *Dean* factor addresses whether defendants had notice of the withheld information. Here, defendants were unaware of the substance of plaintiffs' experts' opinions or findings. Defendant Dr. Hickner was present at the birth, so defendants presumably knew the contents of the videotape; however, defendants had not viewed it. The fifth factor, considering the history of deliberate delay, similarly suggests sanctions were appropriate. Plaintiffs were not responsive until defendants filed formal motions with the trial court. By refusing to respond until defendants filed formal motions, plaintiffs withheld relevant information from defendants for a longer period of time. The sixth *Dean* factor considers the degree to which plaintiffs complied with the court's discovery order. Our review of the record confirms plaintiffs did not

comply with many parts of the court's order, nor did they explain their reasons for not complying before the hearing on the motion to dismiss.

Finally, the trial court was required to determine whether a lesser sanction would better serve the interests of justice. *Dean*, 182 Mich App at 33. After considering plaintiffs' past conduct and weighing it against the *Dean* factors, the trial court found that dismissal was the proper sanction. The trial court had already imposed the lesser sanction of striking four of plaintiffs' witnesses, and defendants had previously filed two motions to compel and two motions to dismiss. Plaintiffs were given numerous chances to comply with their discovery obligations, and, in fact, were warned in August that the trial court was ready to dismiss. Because plaintiffs continued to ignore the discovery order, the trial court's decision to dismiss the case was not outside the range of principled outcomes. *Babcock*, 469 Mich at 269; *Casey*, 273 Mich App at 404.

We affirm. As the prevailing parties, defendants may tax costs pursuant to MCR 7.219.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Patrick M. Meter